Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang

COURT OF APPEAL (PULAU PINANG) — APPEAL NO P-02-348-94
GOPAL SRI RAM, SITI NORMA YAAKOB AND ABDUL MALEK AHMAD JJCA
15 AUGUST 1996

Limitation *— Public authorities — When limitation began to run — Conferment of additional powers on a group of employees — Complaint that appellants were not conferred with similar powers — Appellants remained in similar employment position throughout trial — Continuing default — Whether limitation has began to run — Public Authorities Protection Act 1948 s 2(a)*

Civil Procedure *— Trial — Erroneous admission of law — Whether counsel may withdraw erroneous admission of the law at any time — Whether appellate court bound by view of judge acting on an erroneous admission of the law — Whether it was open for counsel to withdraw the erroneous admission made in the court below*

Constitutional Law *— Fundamental liberties — Equality before the law — Discrimination — Whether appellants had legitimate expectation to be granted powers of auxiliary police sergeants — Whether respondent had acted unfairly or inconsistently or denied the appellants any opportunity — Whether there was unfair discrimination — Federal Constitution art 8*

Constitutional Law *— Fundamental liberties — Equality before the law — Discrimination — Whether unfair discrimination is actionable in Malaysia — What elements and parameters applied*

The appellant and 53 others ('the appellants') were employees of the respondent, holding the post of security assistants regarding time scale, salary scale grade C–11 and conferred the powers of auxiliary police constables. The appellants were dissatisfied with the conferment of only the powers of auxiliary police constables and not that of auxiliary police sergeants in the respondent. In 1981, the respondent made an offer to all their security assistants for the grant of the rank of auxiliary police sergeants. The appellants did not apply because they were of the view that they need not do so as it was a matter of right for them to be conferred the higher auxiliary police rank. According to the appellants, in 1982, 46 of a total of 171 security assistants in the respondent who responded to the offer were conferred the powers of auxiliary police sergeants. These 46 became the supervisors of the appellants. The appellants contended that this was an act of discrimination on the part of the respondent towards the appellants. They consequently protested to the Public Services Department on the basis that their lower standing stood in the way of their promotional chances.

This appeal concerned three main issues. The first concerned the question of limitation as the respondent contended that the appellant's cause of action had lapsed on 10 May 1985 according to the 36-month period as stated in s 2(a) of the Public Authorities Protection

Act 1948. This was because time began to run on 11 May 1982 which was the date the other 46 security assistants were conferred the powers of auxiliary police sergeants. However, the appellants were of the view that since there had been negotiations between the parties since 1982, the relevant date when time began to run for limitation purposes was 5 September 1990 when the appellants were informed by the respondent of the result of the negotiations.

The second was with regard to the proper juridical basis on which a point of law ought to be admitted because the parties had proceeded in the court below upon an erroneous admission of the law which did not bind the appellate court. In the court below, counsel for both parties and the trial judge were of the view that it was within the right of the respondent as an employer to discriminate among his employees. Further, the trial judge held that in the absence of an Act of Parliament, unfair discrimination whether on the basis of sex or other criteria was not actionable. However, upon appeal, counsel for appellants admitted that he had made an error and wished to retract the admission of law he had made before the judge.

The final issue was the subject matter of the appeal itself, namely whether the respondent had acted indiscriminately towards the appellants. Counsel for the appellants maintained that according to art 8(1) and (2) of the Federal Constitution ('the Constitution'), the appellants had a legitimate expectation that they would be given the powers of auxiliary police sergeants and would be paid the same allowances as their other 46 colleagues. Therefore, the respondent's action in conferring the powers of auxiliary police sergeants on only 46 of the security assistants was to the appellants an act which was discriminatory, violated the principles of natural justice, unfair, arbitrary and amounted to a denial of fair opportunities.

Held, dismissing the appeal:

(1) The appellants were not time-barred because the act, neglect or default complained of was a continuing one as the appellants were still in the same position they were in when their 46 colleagues were conferred the powers of auxiliary police sergeants, in which case limitation would run only 36 months after the ceasing of the act, neglect or default complained of, which had yet to have taken place. In the consequence, the plea of limitation must fail (see pp 250I and 251A).

(2) It is well-settled that counsel is not bound by an erroneous admission of law that he made. Neither is the court. If counsel makes an erroneous admission of law, he may withdraw it at any time, even on appeal. If a judge acts upon an erroneous admission of the law, the appellate court is not bound by his views. The appellate court may look at the matter afresh. Therefore, it was open to counsel to withdraw the admission made in the court below and to argue, as a proposition of law, that unfair discrimination is an actionable wrong under the law (see pp 251I

A and 253C); *Che Esah & Anor v Che Limah* [1996] 1 MLJ 36 and *Yap Cheng Kee & Anor v Ow Giam Eng & Anor* [1977] 1 MLJ 177 followed.

(3) There was no basis for the appellants to have a legitimate expectation that they would be given the powers of auxiliary police sergeants and would be paid the same allowances as their 46 colleagues because the respondent had never acted unfairly or inconsistently towards their security assistants or denied them any opportunity but had in fact written to all of them to apply for the higher auxiliary police rank. Since this was the first time this had taken place, the question of the existence of a regular practice had yet to arise (see p 257A–B); *R v Devon CC, ex p Baker* [1995] 1 All ER 73 followed.

(4) Article 8 of the Constitution envisages that there may be lawful discrimination based on classification which is founded on intelligible differentia which distinguishes persons or things that are grouped together from others left out in the group and that the differentia must have a rational relation to the object sought to be achieved by the statute in question. Therefore, in the circumstances of this case, there had been no breach of art 8 (see p 257B–C); *PP v Khong Teng Khen & Anor* [1976] 2 MLJ 166, *Government of Malaysia v VR Menon* [1990] 1 MLJ 277 and *State of Mysore v Krishna Murthy* AIR 1973 SC 1146 followed.

(5) For unfair discrimination to be actionable, the following elements must be proved: (i) there must be some form of discrimination; (ii) the discrimination must be unfair; and (iii) there must be resultant harm or injury. In order to succeed in an action for unfair discrimination, the plaintiff must establish that discrimination was practised upon him. Discrimination per se is not actionable unless it is also unfair. Therefore, to be actionable, discrimination must be accompanied by an element of harshness or unfair bias in favour of one and against another. Further, one who claims to have suffered unfair discrimination in the hands of another cannot succeed unless he is able to demonstrate that he suffered some injury recognized by law. The injury may take the form of pecuniary loss or non-pecuniary loss, such as injury to reputation, property or livelihood. Any discrimination that falls within the exceptions to art 8 of the Constitution is not actionable. Also, the wrong of unfair discrimination pervades both private and public law, although the remedy that may be obtained in each sphere may differ. Unfair discrimination in the context of public law proceedings may be justified in the public interest or on the grounds of national security. Even if all the ingredients of the wrong are present, considerations of public interest or national security may render a claim for unfair discrimination non-justiciable (see pp 257F–H, 258B, D–E, F–G and 259A); *All India Sainik Schools Employees Association v The Defence Minister-cum-Chairman, Board of Governors, Sainik School Society, New*

Delhi & Ors AIR 1989 SC 88, *Indian Oil Corp Ltd v Premier Road Carriers Ltd* AIR 1983 Cal 445; *Dost Mohammad v Union of India* 1981 Lab IC 1210 and *Ranbir Singh v Chief Commercial Superintendent* AIR 1961 Punj 268 followed.

(6) In this case, the respondent had acted fairly, properly and lawfully in inviting all the security assistants to apply for the higher auxiliary police rank and those who did not apply, namely the appellants, surely could not expect to be conferred what they did not apply for. All the security assistants were conferred the same rank of auxiliary police constables and they were all undeniably given the same opportunity to apply and take the examination for the post of auxiliary police sergeants. Therefore, on the facts of the case, there was no discrimination by the respondent against the appellants (see pp 261I and 262C–D); *PP v Khong Teng Khen & Anor* [1976] 2 MLJ 166, *Government of Malaysia v VR Menon* [1990] 1 MLJ 277 and *State of Mysore v Khrisna Murthy* AIR 1973 SC 1146 followed.

[Bahasa Malaysia summary

Perayu dan 53 orang yang lain ('perayu-perayu') merupakan pekerja penentang, yang memegang jawatan penolong keselamatan berkaitan dengan skala masa, skala gaji gred C–11 dan bertauliah kuasa konstabel polis bantuan. Perayu-perayu tidak berpuas hati dengan pengurniaan kuasa konstabel polis bantuan dan bukannya sarjan polis bantuan dalam penentang. Dalam tahun 1981, penentang membuat tawaran pangkat sarjan polis bantuan kepada semua penolong keselamatan. Perayu-perayu tidak memohon sebab mereka berpendapat bahawa mereka tidak perlu berbuat demikian memandangkan mereka mempunyai hak untuk diberikan pangkat polis bantuan yang lebih tinggi. Menurut perayu-perayu, dalam tahun 1982, 46 daripada sejumlah 171 penolong keselamatan dalam penentang yang membalas tawaran itu diberikan kuasa sarjan polis bantuan. Empat puluh enam orang ini telah dijadikan penyelia perayu-perayu. Perayu-perayu berhujah bahawa ini adalah suatu tindakan pembezaan pada pihak penentang terhadap perayu-perayu. Mereka kemudiannya membantah kepada Jabatan Perkhidmatan Awam atas dasar bahawa kedudukan yang lebih rendah menghalang peluang kenaikan pangkat mereka.

Rayuan ini adalah mengenai tiga isu utama. Yang pertama berhubung dengan persoalan pembatasan oleh kerana penentang berhujah bahawa kausa tindakan perayu-perayu telah luput pada 10 Mei 1985 mengikut jangkamasa 36 bulan seperti yang dinyatakan dalam s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948. Ini adalah kerana masa telah bermula pada 11 Mei 1982 yang merupakan tarikh 46 penolong keselamatan yang lain diberikan kuasa sarjan polis bantuan. Walau bagaimanapun, perayu-perayu berpendapat bahawa oleh kerana terdapatnya perundingan antara pihak-pihak sejak tahun 1982, tarikh relevan bila masa bermula bagi tujuan pembatasan

adalah 5 September 1990 apabila perayu-perayu diberitahu oleh penentang tentang keputusan perundingan.

Yang kedua adalah berhubung dengan dasar juridikal yang wajar atas mana suatu hujah undang-undang harus diterima sebab pihak-pihak telah memulakan tindakan di mahkamah bawah mengikut pengakuan undang-undang yang salah yang tidak mengikat mahkamah rayuan. Di mahkamah bawah, peguam untuk kedua-dua pihak dan hakim perbicaraan berpendapat bahawa ianya adalah terangkum dalam hak penentang sebagai majikan untuk membeza antara pekerja-pekerjanya. Tambahan pula, hakim perbicaraan memutuskan bahawa dalam ketiadaan suatu Akta Parlimen, pembezaan yang tidak adil sama ada atas dasar jantina atau kriteria lain tidak boleh didakwa. Namun demikian, atas rayuan, peguam untuk perayu-perayu mengakui bahawa beliau telah melakukan kesilapan dan ingin menarik balik pengakuan undang-undang yang telah dibuat di hadapan hakim.

Isu terakhir adalah perkara subjek rayuan sendiri, iaitu sama ada penentang telah bertindak secara sembarangan terhadap perayu-perayu. Peguam perayu-perayu menghujahkan bahawa menurut perkara 8(1) dan (2) Perlembagaan Persekutuan ('Perlembagaan'), perayu-perayu mempunyai jangkaan sah bahawa mereka akan diberikan kuasa sarjan polis bantuan dan akan dibayar elaun yang sama dengan 46 rakan sekerja yang lain. Oleh yang demikian, tindakan penentang dalam memberikan kuasa sarjan polis bantuan kepada 46 penolong keselamatan sahaja merupakan suatu tindakan yang berdiskriminasi, melanggar prinsip-prinsip keadilan asasi, adalah tidak adil, sewenang-wenang dan sama seperti penafian peluang yang adil kepada perayu-perayu.

Diputuskan, menolak rayuan:

(1) Perayu-perayu tidak dihalang oleh masa sebab tindakan, pengabaian atau keingkaran yang diadu adalah sesuatu yang berterusan oleh kerana perayu-perayu masih dalam kedudukan yang sama seperti dahulu apabila 46 rakan sekerja mereka diberikan kuasa sarjan polis bantuan, di mana pembatasan hanya bermula 36 bulan selepas berhentinya tindakan, pengabaian atau keingkaran yang diadu, yang belum lagi berlaku. Akibatnya, rayuan pembatasan tidak boleh berjaya (lihat ms 250I dan 251A).

(2) Adalah sesuatu yang mantap bahawa peguam tidak terikat oleh pengakuan undang-undang salah yang dibuat olehnya. Mahkamah juga tidak terikat. Jika peguam melakukan kesilapan pengakuan undang-undang, beliau boleh menarik balik pada bila-bila masa, walaupun atas rayuan. Jika seseorang hakim bertindak atas suatu kesilapan pengakuan undang-undang, mahkamah rayuan tidak terikat oleh pandangan beliau. Mahkamah rayuan boleh melihat perkara itu secara baru. Oleh itu, ianya terbuka kepada peguam untuk menarik balik pengakuan yang dibuat di mahkamah bawah dan untuk berhujah, sebagai suatu usul undang-undang, bahawa pembezaan yang tidak adil

adalah suatu kesalahan yang boleh didakwa di bawah undang-undang (lihat ms 251I dan 253C); *Che Esah & Anor v Che Limah* [1996] 1 MLJ 36 dan *Yap Cheng Kee & Anor v Ow Giam Eng & Anor* [1977] 1 MLJ 177 diikut. A

(3) Tidak ada dasar untuk perayu-perayu mempunyai jangkaan sah bahawa mereka akan diberikan kuasa sarjan polis dan akan dibayar elaun yang sama dengan 46 rakan sekerja sebab penentang tidak pernah bertindak secara tidak adil atau secara tidak konsisten terhadap penolong keselamatan mereka atau menafikan mereka sebarang peluang tetapi telah pada hakikatnya menulis kepada kesemua orang untuk memohon pangkat polis bantuan yang lebih tinggi. Oleh kerana ini merupakan kali pertama ia berlaku, persoalan kewujudan amalan yang lebih tetap belum lagi timbul (lihat ms 257A–B); *R v Devon CC, ex p Baker* [1995] 1 All ER 73 diikut. B C

(4) Perkara 8 Perlembagaan membayangkan bahawa mungkin terdapatnya pembezaan yang sah berdasarkan klasifikasi yang berasaskan 'intelligible differentia' yang membezakan orang atau benda yang dihimpunkan bersama daripada yang lain yang ditinggalkan dalam kumpulan dan bahawa perbezaan mestilah mempunyai suatu perhubungan rasional kepada objek yang ingin dicapai oleh statut berkenaan. Oleh yang demikian, dalam keadaan kes ini, tiada kemungkiran perkara 8 (lihat ms 257B–C); *PP v Khong Teng Khen & Anor* [1976] 2 MLJ 166, *Government of Malaysia v VR Menon* [1990] 1 MLJ 277 dan *State of Mysore v Krishna Murthy* AIR 1973 SC 1146 diikut. D E

(5) Bagi menjadikan pembezaan tidak adil boleh didakwa, unsur-unsur berikut haruslah dibuktikan: (i) mesti terdapat bentuk pembezaan; (ii) pembezaan mestilah tidak adil; dan (iii) mesti terdapat sesuatu keburukan atau kerugian yang diakibatkan. Untuk berjaya dalam tindakan pembezaan tidak adil, plaintif harus menunjukkan pembezaan yang diamalkan atas dirinya. Pembezaan per se tidak boleh didakwa melainkan ia juga adalah tidak adil. Oleh itu, untuk menjadi boleh didakwa, pembezaan mestilah disertai dengan unsur kekerasan atau prasangka tidak adil yang memihak satu pihak dan bukan pihak lain. Selanjutnya, seseorang yang mendakwa telah mengalami pembezaan yang tidak adil di tangan seorang yang lain tidak boleh berjaya melainkan dia boleh menunjukkan bahawa dia telah mengalami kerosakan yang diiktiraf oleh undang-undang. Kerosakan mungkin mengambil bentuk kerugian wang atau kerugian bukan wang, misalnya kerosakan kepada reputasi, harta atau mata pencarian. Sebarang pembezaan yang terangkum dalam kekecualian kepada perkara 8 Perlembagaan tidak boleh didakwa. Tambahan pula, kesalahan pembezaan tidak adil meliputi kedua-dua undang-undang persendirian dan undang-undang awam, walaupun remedi yang boleh diperolehi dalam setiap bidang mungkin berbeza. Pembezaan tidak adil dalam konteks prosiding undang-undang F G H I

awam dapat diberikan justifikasi dalam kepentingan awam atau atas alasan keselamatan negara. Jika pun semua bahan kesalahan hadir, pertimbangan kepentingan awam atau keselamatan negara boleh menyebabkan suatu tuntutan untuk pembezaan tidak adil tak boleh diadili (lihat ms 257F–H, 258B, D–E, F–G dan 259A); *All India Sainik Schools Employees Association v The Defence Minister-cum-Chairman, Board of Governors, Sainik School Society, New Delhi & Ors* AIR 1989 SC 88, *Indian Oil Corp Ltd v Premier Road Carriers Ltd* AIR 1983 Cal 445; *Dost Mohammad v Union of India* 1981 Lab IC 1210 dan *Ranbir Singh v Chief Commercial Superintendent* AIR 1961 Punj 268 diikut.

(6) Dalam kes ini, penentang telah bertindak secara adil, dengan wajar dan sah dari segi undang-undang dengan menjemput kesemua penolong keselamatan untuk memohon pangkat polis bantuan yang lebih tinggi dan mereka yang tidak memohon, iaitu perayu-perayu tentulah tidak boleh menjangka diberikan apa yang tidak dipohon. Kesemua penolong keselamatan diberikan taraf yang sama yakni konstabel polis bantuan dan mereka semuanya diberikan peluang yang sama untuk memohon dan mengambil peperiksaan untuk jawatan sarjan polis bantuan. Oleh yang demikian, atas fakta kes, tiada pembezaan oleh penentang terhadap perayu-perayu (lihat ms 261I dan 262C–D); *PP v Khong Teng Khen & Anor* [1976] 2 MLJ 166, *Government of Malaysia v VR Menon* [1990] 1 MLJ 277 dan *State of Mysore v Khrisna Murthy* AIR 1973 SC 1146 diikut.]

Notes

For cases on limitation period governing public authorities, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1903–1905.

For cases on trials in civil cases, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3593–3642.

For cases on fundamental liberties, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 838–970.

Cases referred to

All India Sainik Schools Employees Association v The Defence Minister-cum-Chairman, Board of Governors, Sainik School Society, New Delhi & Ors AIR 1989 SC 88 (folld)

Che Esah & Anor v Che Limah [1966] 1 MLJ 36 (folld)

Connecticut Fire Insurance Co v Kavanagh [1892] AC 473 (refd)

Dost Mohammad v Union of India 1981 Lab IC 1210 (folld)

Government of Malaysia v VR Menon [1990] 1 MLJ 277 (folld)

Gulwant Singh v Abdul Khalik [1965] 2 MLJ 55 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)

Indian Oil Corp Ltd v Premier Road Carriers Ltd AIR 1983 Cal 445 (folld)

Letchumi & Anor v The Asia Insurance Co Ltd [1972] 2 MLJ 105

(refd)
Mohd Azam Shuja & Ors v United Malayan Banking Corp Bhd [1995] 2 MLJ 851 (refd)
PP v Khong Teng Khen & Anor [1976] 2 MLJ 166 (folld)
R v Devon CC, ex p Baker [1995] 1 All ER 73 (folld)
Ranbir Singh v Chief Commercial Superintendent AIR 1961 Punj 268 (folld)
State of Mysore v Krishna Murthy AIR 1973 SC 1146 (folld)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (refd)
Yap Cheng Kee & Anor v Ow Giam Eng & Anor [1977] 1 MLJ 177 (folld)

Legislation referred to

Federal Constitution arts 5(1), 8(1)
Police Act 1967 s 49A
Public Authorities Protection Act 1948 s 2(a)
Rules of the Court of Appeal 1994 r 18

Appeal from: Originating Summons No 24–951–92 (High Court, Pulau Pinang)

P Navaratnam and *MM Athimulan* (*Nava & Associates*) for the appellants.
Zarina Hussain and *Ramsun Ho Chin Huey* (*Lim Huck Aik & Co*) for the respondent.

Abdul Malek Ahmad JCA (delivering the judgment of the court): At the hearing of the appeal before us, we were confronted with three main issues. The first concerned the question of limitation which, if we agreed with the views of learned counsel for the respondent, would eliminate the necessity of dealing with the other two issues.

The second was as regards the proper juridical basis on which a point of law ought to be admitted because the parties had proceeded in the court below upon an erroneous admission of the law which did not bind us. The third was the subject matter of the appeal itself, namely whether the respondent had acted indiscriminately towards Ahmad Tajudin bin Hj Ishak, on behalf of himself and for 53 others holding the post of security assistants time scale, salary scale grade C–11 and conferred the powers of auxiliary police constables (who, for the purposes of this judgment, shall hereinafter be collectively referred to as 'the appellants').

By an originating summons dated 10 November 1992, the appellants had asked:

(a) for a declaration that the respondent had acted indiscriminately towards the appellants as regards the salary scale grade C–11 for the security assistants conferred with the powers of auxiliary police constables;

(b) for a declaration that the appellants had the right to be conferred the powers of auxiliary police sergeants effective from 1 May 1982;

(c) a consequential order directing the respondent to cease acting indiscriminately for the particular salary scale and that the appellants be given the same standing as the auxiliary police sergeants and enjoy the benefits enjoyed by other security assistants in salary scale grade C–11 who had been conferred the powers of auxiliary police sergeants;

(d) a consequential order directing the respondent to pay the appellants a special allowance payable to security assistants in salary scale C–11 conferred the powers of auxiliary police sergeants at RM40 a month effective from 1 May 1982 or from a date fixed by the court;

(e) a consequential order directing the respondent to pay the appellants the difference of RM53 a month from 1 September 1991 which is the difference of the housing rent allowance of RM138 a month payable to security assistants in salary scale grade C–11 conferred the powers of auxiliary police sergeants as compared to the allowance of RM85 a month for the same category paid to the appellant;

(f) costs;

(g) interest; and

(h) any other order or relief deemed fit and appropriate by the court.

It must be mentioned here that the relevant effective date should have been 11 May 1982 and not 1 May 1982 as wrongly stated in the originating summons.

We shall start by examining whether the matter is time-barred in the first place as pointed out by learned counsel for the respondent. According to learned counsel for the appellants, there had been negotiations between the parties in this action since 1982 the result of which only came to their knowledge on 5 September 1990 which, in his view, would be the relevant date time would begin to run for limitation purposes.

Learned counsel for the respondent, however, contended that time would begin to run on 11 May 1982 for the following reasons:

(a) that was the date the other 46 security assistants were conferred the powers of auxiliary police sergeants;

(b) there was never any negotiations between the parties as alleged and therefore no promise by the respondent to negotiate on the conferment of the powers of auxiliary police sergeants, citing the cases of *Ng Moh v Tan Bok Kim & Anor* [1969] 1 MLJ 46 and *Nasri v Mesah* [1971] 1 MLJ 32 as cases on point;

(c) the respondent's letter dated 5 September 1990 was only in relation to special allowances;

and accordingly in view of the 36-month period stated in s 2(a) of the Public Authorities Protection Act 1948 ('the Act'), the appellants' cause of action against the respondent would have lapsed on 10 May 1985. Since the matter was filed only on 10 November 1992, she submitted that the appellants were well out of time.

The appellants insisted that after their colleagues were conferred the higher auxiliary police rank, their union had made representations to the

Public Services Department which by letter dated 8 October 1983 informed the union that the respondent had been directed to comply with all the terms and conditions relating to promotions.

The appellants had sent a memorandum of their claim to the respondent copied to the Public Services Department on 17 March 1986. By letter dated 29 May 1986, the Public Services Department had written to the respondent stating that the issue of police ranking and the allotment of different duties among the security assistants is the problem of the management of the respondent. They were of the view that personnel in the same salary scale ought to be given similar duties on the principle of 'the rate for the job'. They had proposed a meeting with the Ministry of Transport to reach a solution.

On 16 September 1987, the respondent wrote to the union saying that the position, promotional aspects and salary of a security assistant either with the rank of auxiliary police sergeant or auxiliary police constable were both based on salary scale grade C–11 and the difference existed only from the aspect of auxiliary police powers to ensure the smooth administration and operation of the respondent's security force.

The issue remained unresolved until the respondent decided by letter dated 11 August 1990 to pay the 46 auxiliary police sergeants a special allowance of RM40 which was backdated to their appointment date on 11 May 1982. The respondent also decided to pay all security assistants a housing allowance with effect from 1 September 1991, but the appellants only received RM85 while the 46 others were paid RM138 although the categories were on the same salary scale grade C–11.

Although the respondent had informed the appellants that their decision was final by letter dated 5 September 1990, the appellants only filed these proceedings by originating motion on 10 November 1992. As stated earlier, the appellants maintain that time should only begin to run from 5 September 1990 and they are not, therefore, out of time.

Section 2(a) of the Act reads:

> 2 Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect—
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;
>
> ...

Despite the submissions of both learned counsel for the appellants and learned counsel for the respondent on this point, we were more inclined to hold that the act, neglect or default complained of is a continuing one as

A the appellants are still in the same position they were in when their 46 colleagues were conferred the powers of auxiliary police sergeants, in which case limitation would only run 36 months after the ceasing of the act, neglect or default complained of, which is yet to take place. In the consequence, the plea of limitation must fail.

B We move now to the second issue. At the start of submissions, we were under the impression that learned counsel for the appellants was raising a new point not raised in the court below and learned counsel for the respondent had no objections. We were inclined to allow it in view of r 18 of the Rules of the Court of Appeal 1994 and several case authorities, namely *Mohd Azam Shuja & Ors v United Malayan Banking Corp Bhd* C [1995] 2 MLJ 851, *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55, *Letchumi & Anor v The Asia Insurance Co Ltd* [1972] 2 MLJ 105, *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 and *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261. As the submissions continued, however, we discovered that the parties had actually D proceeded in the trial court upon an erroneous admission of the law which did not bind us.

In the court below, counsel for both sides stood on common ground upon the issue of discrimination. They agreed that it was within the right of the respondent as an employer to discriminate among his employees. They also agreed that, in the absence of an Act of Parliament on that E behalf, unfair discrimination whether on the basis of sex or other criteria was not actionable. The trial judge held the same view. Indeed, he said so in no uncertain terms in his judgment.

Counsel and the judge were quite wrong, of course. They all overlooked the far-reaching provisions of arts 5(1) and 8(1) of the Federal F Constitution ('the Constitution'). The combined effect of these two articles is to strike down any arbitrary or harsh and unfair action which adversely affects the quality of life. See *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 and *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481. It follows that G where a person's livelihood or reputation is adversely affected by a decision, then the decision-maker must act fairly and reasonably.

Before us, counsel for the appellants said that he realized the error into which he had fallen in the court below. He wished to retract the admission of law he had made before the judge. Cik Zarina Hussain, who appeared for the respondent, was absolutely fair in her approach to this H change of stance by the appellant. She conceded that it was open to the appellants to take the point.

Now, it is well-settled that counsel is not bound by an erroneous admission of law that he makes. Neither is the court. If counsel makes an erroneous admission of law, he may withdraw it at any time; even on I appeal. If a judge acts upon an erroneous admission of law, this court is not bound by his views. We may look at the matter afresh. There are several authorities in support of the view that we take of the matter, but we find it quite sufficient to quote from just two of them.

The first is *Che Esah & Anor v Che Limah* [1966] 1 MLJ 36 at p 37 where Barakbah CJ Malaya said:

> There is one other matter which should be mentioned on the question as to whether the proper application is by way of motion for the withdrawal of the admission by the defendants' counsel or whether it can be made orally. The answer could be found in the case of *The State of Perak v PRALMN Muthukaruppan Chettiar* [1938] MLJ 247 at p 256. McElwaine CJ (SS) stated, inter alia:
>
> 'In *PMNT Ramasamy Chetty v Syed Alsagoff* 7 FMSLR 93, Thorne J at p 120 said:
>
> "Counsel for the respondent at the hearing below conceded that the respondent was the representative in interest of her own nominees, namely, the persons named in the transfers to the appellants as transferors. In the Court of Appeal, counsel submitted that there was an erroneous view of the law and that the respondent could be heard to say, notwithstanding this statement or admission, that it was erroneous. I am incline to the opinion that this submission is correct. It seems to me that the statement of counsel below amounted to no more than that his opinion on the facts proved was that the respondent was the representative in interest of his own nominees and that he did not propose to argue that they were not. I think that the respondents are now at liberty to urge that this opinion was incorrect."
>
> This passage which gives fuller reasons than Farrer-Manby J gave at p 115 for allowing the withdrawal appears to me exactly in point. The admission of counsel below appears to have been erroneous in law. But I would go further and say that as an admission it differs from ordinary admissions which may be said to be evidence of matters of which the court had not full knowledge such as the admission in *Hallen v Worman* 3 LT (NS) 741 and *Urquhart v Butterfield* 37 Ch D 357. In this case counsel's admission introduced no new evidence. Had he stated that further enquiry had satisfied the commissioner of estate duty that the property was joint family property, it would have been very different.
>
> He gave his own opinion of the facts proved. "The last witness has altered my view". There was no reason why the last witness should have altered the views of the judge on the evidence before him. The admission was accepted by the judge and forms the basis of this part of his judgment.
>
> In my opinion this court should disregard the admission on the grounds that it was an erroneous statement of law no more binding or authoritative than many other bizarre propositions of law to which courts have to listen.'
>
> I therefore hold that an application for withdrawal of admission on the ground that it was an erroneous statement of law could be made to the court orally.

The second is *Yap Cheng Kee & Anor v Ow Giam Eng & Anor* [1977] 1 MLJ 177, where at p 178, Ali Ag LP said:

> As appears from the learned Magistrate's Grounds of Decision, he was of the view that counsel agreed the appellants' father was a statutory tenant and confined himself to the question whether the children of a statutory

A tenant were entitled to the tenancy after his death. It is unarguable that a statutory tenant has a purely personal right. But was deceased a statutory tenant? This can be decided here even if counsel had made an erroneous admission. I would quote a passage from *Maharani Beni Pershad Koeri v Dudh Nath Roy et al* (1899) LR 26 IA 216 at p 221:

> B 'In the opinion of their Lordships this admission if correctly understood, was erroneous in point of law, and does not preclude the counsel for the appellants on this appeal from claiming his client's legal rights.'

Based on these authorities, we are satisfied that it is open to counsel to now withdraw the admission made in the court below and to argue, as a proposition of law, that unfair discrimination is an actionable wrong under C our law.

Article 8(1) of the Constitution states that all persons are equal before the law and entitled to the equal protection of the law. Learned counsel for the appellants maintained that his clients had a legitimate expectation that they would be given the powers of auxiliary police sergeants D and would be paid the same allowances as their 46 colleagues. He had cited Basu's *Commentary on the Constitution of India* (Volume B) on art 14 at p 142 which states that even where a person claiming some benefit or privilege has no legal right to it in private law, he may have a legitimate expectation of receiving the benefit or privilege as a matter of public law in which case the courts will insist on a fair procedure. Of course, in order to E constitute such legitimate expectation, it must have a reasonable basis, for example, a statement of undertaking or any act on the part of the public authority which would make it unfair or inconsistent with good administration to deny such opportunity or the existence of a regular practice which the claimant can reasonably expect to continue.

F He had argued that the relevant article is an injunction to both the legislative and executive organs of the state and other subordinate authorities not to deny to any person equality before the law or the equal protection of the law. Article 8(2) of the Constitution also provides that there shall be no discrimination against citizens in the appointment to any office or employment under a public authority which according to learned counsel G would encompass all stages of service from initial appointment to termination including promotion, fixing of seniority, termination, gratuity and the like.

The intent of the article denotes that all employees shall be treated alike under like circumstances both in privileges and obligations and it H must be ensured that there is equality among equals and that persons similarly placed are not discriminated against and denied equal treatment. Here, the respondent's action in conferring the powers of auxiliary police sergeants on only 46 of the security assistants was to the appellants an act which was discriminatory, violative of the principles of natural justice, I unfair, arbitrary and amounted to a denial of fair opportunities.

But, on the facts of this case, has there been unfair treatment among the security assistants working for the respondent? All of them were in the same salary scale grade C–11 and each and everyone received the same amount of take-home pay at the end of each month. They were initially all

conferred with the same auxiliary police rank, namely as auxiliary police constables. They were all given the same opportunity to apply for the post of auxiliary police sergeants which is not and cannot be denied by the appellants who had all acknowledged receipt. However, the appellants chose not to apply. Can they now argue that they had been deprived of the opportunity?

The only difference between the appellants and the 46 security assistants conferred the rank of auxiliary police sergeants is as regards the subsequent addition of special allowances which is not part of the salary scheme for security assistants. Section 49A of the Police Act 1967 provides that an auxiliary police officer shall serve voluntarily and shall not be entitled to any remuneration for such service save for such allowances as may be prescribed by the Minister from time to time in relation to specific duties. In effect, the special allowances are given as a reward for the additional duties.

A security assistant in salary scale grade C–11 is eligible for promotion to salary scale grades C–3 and C–1 through examinations which have nothing to do with the conferment of auxiliary police powers and rank. Further, the number of security assistants working with the respondent who are to be conferred the powers of auxiliary police sergeants has to be limited for practical reasons in order to create an effective chain of command within the respondent's security force. Also, the number approved on the facts of this case which was 46, was the decision of the Inspector General of Police by letter dated 13 February 1981 and not that of the respondent.

It has been decided in *PP v Khong Teng Khen & Anor* [1976] 2 MLJ 166 that the principle underlying art 8 of the Constitution is that the law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it must be general in character and universal in application and that the state is no longer to have the power of distinguishing and classifying persons for the purpose of legislation. It was also held that all that art 8 guarantees is that a person in one class should be treated the same as another person in the same class.

In *Government of Malaysia v VR Menon* [1990] 1 MLJ 277, the respondent was a pensioner receiving pension from the Malaysian government although he is an Indian citizen residing in Madras, India. Foreign resident pensioners were excluded by s 1(2) of the Pensions Adjustment Act 1980 from receiving additional benefits. He was successful in his action in the court below where the trial judge held that the restriction imposed by the said section was void and of no effect.

On appeal to the Supreme Court, a five-member panel ruled that there can be no doubt that the said provision was discriminatory against foreign resident pensioners, but the classification between foreign and local resident pensioners is founded on an intelligible differentia and has a rational nexus with the object to be achieved by the Act which is to ameliorate the financial position of pensioners in Malaysia due to the depreciating value of the ringgit and the rise in the cost of living in this

country. They added that the residential qualification imposed constitutes a permissible discrimination and therefore did not violate the equality provision of art 8(1) of the Constitution.

The brief note in *State of Mysore v Krishna Murthy* AIR 1973 SC 1146 at p 1147 states:

> Inequality of opportunity of promotion, though not unconstitutional per se, must be justified on the strength of rational criteria correlated to the object for which the difference is made. In the case of government servants, the object of such a difference must be presumed to be a selection of the most competent from amongst those possessing qualifications and backgrounds entitling them to be considered as members of one class. In some cases, quotas may have to be fixed between what are different classes or sources for promotion on grounds of public policy. If, on the facts of a particular case, the classes to be considered are really different, inequality of opportunity in promotional chances may be justifiable. On the contrary, if the facts of a particular case disclose no such rational distinction between members of what is found to be really a single class, no class distinctions can be made in selecting the best. Articles 14 and 16(1) of the Constitution must be held to be violated when members of one class are not even considered for promotion. In the latter type of cases, the difference in promotional opportunities of those who were wrongly divided into two classes for this purpose only could not be justified on any rational grounds.

As for the legitimate expectation point, it is appropriate at this point to reproduce the speech of Simon Brown LJ in *R v Devon CC, ex p Baker* [1995] 1 All ER 73 where at pp 88–89 he had said:

> It is first, I think, convenient to identify, at least in broad categories, various of the distinct senses in which the phrase 'legitimate expectation' is nowadays used.
>
> (1) Sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied to him. It was used in this sense and the assertion upheld in cases such as ... *R v Secretary of State for the Home Dept, ex p Ruddock* [1987] 2 All ER 518, [1987] 1 WLR 1482. It was used in the same sense but unsuccessfully in, for instance, *R v Board of Inland Revenue, ex p MFK Underwriting Agencies Ltd* [1990] 1 All ER 91, [1990] 1 WLR 1545 and *R v Jockey Club, ex p RAM Racecourses Ltd (1990)* [1993] 2 All ER 225. The various authorities show that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel. In so far as the public body's representation is communicated by way of a stated policy, this type of legitimate expectation falls into two distinct sub-categories: cases in which the authority are held entitled to change their policy even so as to affect the claimant, and those in which they are not. An illustration of the former is *R v Torbay BC, ex p Cleasby* [1991] COD 142; of the latter, *R v Secretary of State for the Home Dept, ex p Khan* [1985] 1 All ER 40, [1984] 1 WLR 1337.

(2) Perhaps conventionally, the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words, the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognizes that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision. Of the various authorities drawn to our attention, *Schmidt v Secretary of State for Home Affairs* [1969] 1 All ER 904, [1969] 2 Ch 149; *O'Reilly v Mackman* [1982] 3 All ER 1124, [1983] 2 AC 237 and the recent decision of Roch J in *R v Rochdale Metropolitan BC, ex p Schemet* [1993] 1 FCR 306 are clear examples of this head of legitimate expectation.

(3) Frequently, however, the concept of legitimate expectation is used to refer to the fair procedure itself. In other words, it is contended that the claimant has a legitimate expectation that the public body will act fairly towards him. As was pointed out by Dawson J in *A-G for New South Wales v Quin* (1990) 93 ALR 1 at p 39, this use of the term is superfluous and unhelpful: it confuses the interest which is the basis of the requirement of procedural fairness with the requirement itself:

> 'No doubt people expect fairness in their dealings with those who make decisions affecting their interests, but it is to my mind quite artificial to say that this is the reason why, if the expectation is legitimate in the sense of well founded, the law imposes a duty to observe procedural fairness. Such a duty arises, if at all, because the circumstances call for a fair procedure and it adds nothing to say that they also are such as to lead to a legitimate expectation that a fair procedure will be adopted.'

(4) The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it. The authority is bound by its assurance, whether expressly given by way of a promise or implied by way of established practice. *Re Liverpool Taxi Owners' Association* [1972] 2 All ER 589, [1972] 2 QB 299 and *A-G of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346, [1983] 2 AC 629 are illustrations of the court giving effect to legitimate expectations based upon express promises; *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, [1985] AC 374 is an illustration of a legitimate expectation founded upon practice albeit one denied on the facts by virtue of the national security implications.

Let me acknowledge at once that the above is by no means an exhaustive analysis of the concept of legitimate expectation; anyone interested in that should study instead Mr Paul Craig's illuminating article 'Legitimate Expectations: A Conceptual Analysis' (1992) 108 LQR 79, rather it is an attempt at a broad categorisation which may, I hope, clear away some, at least, of the many semantic confusions that have bedevilled this area of our law.

A In our case, there is really no basis for the appellants to have this legitimate expectation because the respondent had never acted unfairly or inconsistently towards their security assistants or denied them any opportunity but had in fact written to all of them to apply for the higher auxiliary police rank. Since this was the first time this had taken place, the question of the existence of a regular practice has yet to arise.

B

Having carefully considered the submissions, we could only conclude that the relevant article envisages that they may be lawful discrimination based on classification which is founded on intelligible differentia which distinguishes persons or things that are grouped together from others left out in the group and that the differentia must have a rational relation to C the object sought to be achieved by the statute in question. In the circumstances of this case, our view was that there had been no breach of art 8 of the Constitution.

Having said that, we now turn to the third point as to whether there had been discrimination exercised by the respondent in the conferment of D the auxiliary police rank. One could argue that the finding of no breach of art 8 of the Federal Constitution would render this question purely rhetorical.

As presently advised, we are unaware of any decision of our courts where it has been expressly held that unfair discrimination is actionable. E Counsel have not cited any Malaysian authority on the point. We are therefore constrained to treat this appeal as a case of first impression. It therefore becomes necessary to determine the ingredients of the wrong in question as well as its parameters. In carrying out this task, we are aided by authorities decided by the courts of India where the constitutional provisions are, in substance, similar to our own.

F In our judgment, for unfair discrimination to be actionable, the following elements must be proved to exist:

(a) there must be some form of discrimination;

(b) the discrimination must be unfair; and

G (c) there must be resultant harm or injury.

Taking the first ingredient, a plaintiff, in order to succeed in an action for unfair discrimination, must establish that discrimination was practised upon him. Generally speaking, discrimination usually occurs when equals are treated unequally or when unequals are treated equally. See *All India* H *Sainik Schools Employees Association v The Defence Minister-cum-Chairman, Board of Governors, Sainik School Society, New Delhi & Ors* AIR 1989 SC 88 at p 92. However, it all depends upon the facts of a given case. It is the conduct of the defendant towards the particular plaintiff that calls for attention and not particular acts or omissions. But this statement must not be taken too far. For, cases may occur where a single act or omission on I the part of the defendant may have a continuing discriminatory effect upon the plaintiff. Take the case of promotions in the sphere of employment. If a plaintiff's promotion is withheld while another who is similarly circumstanced is promoted, it is but one act, or more appropriately, one

omission. Nevertheless, it has a discriminatory effect upon the plaintiff. Whether discrimination was practised in a particular case is a question of fact depending upon the facts and circumstances of the given case. See *Indian Oil Corp Ltd v Premier Road Carriers Ltd* AIR 1983 Cal 445.

Discrimination per se is not actionable unless it is also unfair, and this brings us to the second ingredient. To be actionable, discrimination must be accompanied by an element of harshness or unfairness. In other words, there must be unjust or unreasonable or unfair bias in favour of one and against another. See *Dost Mohammad v Union of India* 1981 Lab IC 1210; *Ranbir Singh v Chief Commercial Superintendent* AIR 1961 Punj 268. Generally speaking, there must be a rational nexus between the conduct complained of as amounting to discrimination and the object that is sought to be achieved by it. That nexus may be based on sociological or economic or cultural considerations. But the reference to the existence of such a nexus is merely a guide. At the end of the day, an objective assessment of the facts of a particular case should leave the court with the impression that a plaintiff has received harsh, unreasonable or unfair treatment in the hands of the defendant.

The third ingredient of the wrong is damage. One who claims to have suffered unfair discrimination in the hands of another cannot succeed unless he is able to demonstrate that he has suffered some injury recognized by law. The injury may take the form of pecuniary loss. Or it may be non-pecuniary, such as injury to reputation or to property or to livelihood. So long as there is some injury which the law recognizes, the third requirement is met.

Having identified the wrong and its elements, it now becomes necessary to determine its parameters. We may, we think, safely begin with the proposition that any discrimination that is sanctioned by the Constitution is beyond challenge. For, the supreme law has, after propounding the doctrine of equality in art 8(1), gone on to carve out exceptions to it. Any discrimination that falls within these exceptions is therefore not actionable.

Next, it may be safely said that the wrong of unfair discrimination pervades both private and public law, although the remedy that may be obtained in each sphere may differ. For instance, an employee in the public service may, upon proof of unfair discrimination, obtain a declaration and an order of specific enforcement that has the effect of terminating the discrimination, for example, by directing that the particular plaintiff be promoted, or by quashing an order of demotion. We make it clear that the instances we have mentioned are mere illustrations and that the remedy in each case must be moulded to fit its own circumstances. In private law, on the other hand, proof of unfair discrimination will usually be capable of being remedied by an award of damages, the measure of which will vary according to the injury consequent upon the wrong.

Third and last, unfair discrimination in the context of public law proceedings may be justified in the public interest or on grounds of national security. Even if all the ingredients of the wrong are present,

considerations of public interest or national security may render a claim for unfair discrimination non-justiciable. By way of illustration, two persons may be involved in certain activity which the executive may consider to be contrary to national security. It may order the detention of one but not the other. Such an exercise of power, although prima facie discriminatory, is not actionable.

With the foregoing matters in mind, we now turn to consider whether the appellants have made out a case of unfair discrimination.

The grouse of the appellants is basically that they are dissatisfied with the conferment of only the powers of auxiliary police constables and not that of auxiliary police sergeants because the rank of constable is not of the same standing with the posts they are holding and not in line with their counterparts at the Klang Port Authority who had been conferred the powers of auxiliary police sergeants. According to the appellants, the respondent had in 1981 created a new post called junior security assistants in salary scale grade D19–1 also conferred with the powers of auxiliary police constables. Then, in line with the revised scheme of the Public Services Department effective from 1 November 1982, this new group was placed in the scheme for security assistants time scale in salary scale grade D–11 and conferred the powers of auxiliary police constables. The new group carried out the same duties with the appellants although the pay of the appellants were higher.

In 1982, 46 of the 171 security assistants in the respondent were conferred the powers of auxiliary police sergeants. These 46 became the supervisors of the appellants. The appellants contended that this was an act of discrimination on the part of the respondent towards the appellant. They consequently protested to the Public Services Department on the basis that their lower standing stood in the way of their promotional chances.

By letter dated 8 October 1983, the Public Services Department had informed the appellants that the Department had directed the respondent 'to comply with all the terms and conditions of the promotions of the security assistants time scale to security assistants super scale as stated in the service scheme for security assistants approved by the Department'. There was, however, no mention of conferring the appellants the powers of auxiliary police sergeants.

The facts on the whole are not actually in dispute and to get a proper perspective of the problem, it is pertinent to start from the meeting held on 6 September 1969 which was attended by the police, the Ministry of Transport and the respondent. That meeting was the result of the receipt of several complaints from the Shipowners Association that pilferage was rampant in the Penang Port and the intention was to reorganize the respondent's security force and to confer them police powers so that it would become more effective. The police were at that stage prepared to confer auxiliary police powers to the respondent's security assistants provided they ceased to be members of any trade union.

It is also relevant to refer to the minutes of a meeting held on 14 June 1971 at the Police Headquarters in Kuala Lumpur where it is stated that the appointment of 112 security assistants in the respondent as auxiliary police sergeants at Port Swettenham (now the Klang Port Authority) has not been agreed to as the conditions were different in that other port and until they had acquired enough experience and expertise to carry out investigations, consideration would not be given to promote them from auxiliary police constables to auxiliary police sergeants. A B

Before 1975, all security assistants in the various port authorities in the country were employed under their respective salary schemes. Under the Harun Report in 1975, all personnel who had been employed as security assistants in the said ports were placed under salary scale C16–7. However, the security assistants in the Klang Port Authority held the rank of auxiliary police sergeants while those in the respondent were only conferred the powers of auxiliary police constables. C

In 1977, pursuant to the Cabinet Committee on salary revision, the salary scheme for security assistants was changed to C–16. By letter dated 6 May 1977, the Public Services Department informed all concerned that the said grade C–16 had been changed to C–11. By the respondent's service scheme circular for security assistants dated 1 February 1984, C–11 is for those in time scale, C–3 for those in the senior scale and C–1 for those in super scale. It must be emphasized here that the respondent uses the salary scheme of the Public Services Department as the basis of its salary and promotions, but it is actually only a civilian scheme and does not cater to the auxiliary police ranks conferred. D E

This is definitely relevant in the light of the fact that in 1981, the respondent had wanted to introduce a chain of command in its security force and had proposed a system of ranks to the Inspector General of Police who had only approved 46 posts to be conferred the rank of auxiliary police sergeants. F

The respondent accordingly made the offer to all their security assistants who had duly acknowledged receipt of the offer. The appellants did not apply and in this appeal, their learned counsel insisted that this is because they are of the view they need not as it is a matter of right for them to be conferred the higher auxiliary police rank. Eventually, 46 of their colleagues who did respond to the offer were conferred the rank of auxiliary police sergeants on 11 May 1982. Apart from responding to the offer, those who were conferred the higher auxiliary rank were not required to sit for any examination or undergo any tests. G H

It is relevant to take into consideration that although all security assistants in the respondent and in the Klang Port Authority were given auxiliary police rank, the police had decided, as confirmed by the minutes of the meeting held on 14 June 1971 at their headquarters in Kuala Lumpur, that those in the respondent were to be conferred the rank of auxiliary police constable while those in the Klang Port Authority were to be conferred the rank of auxiliary police sergeant. This was because the qualification for entry was Sijil Rendah Pelajaran (Lower Certificate of I

A Education) for the respondent, but the higher Sijil Pelajaran Malaysia (Malaysian Certificate of Education) for the Klang Port Authority.

From 1971 to 1975, all the security assistants in the respondent were conferred the rank of auxiliary police constable and no one had complained. The only thing was that there were three stripes on the epaulette of their B uniforms which were similar to that worn in the Klang Port Authority. After 1977, the post of junior security assistant was created in the Klang Port Authority with the aim of employing the services of personnel with the powers of auxiliary police constable and possessing the Sijil Rendah Pelajaran qualification because the security assistants they were already employing held the rank of auxiliary police sergeant as they were holders C of the Sijil Pelajaran Malaysia qualification. This was approved by the Public Services Department. When the respondent wanted to increase their security force, they were forced to follow the same scheme with junior security assistants possessing the Sijil Rendah Pelajaran qualification placed in salary scale D–11.

D In 1981, with the need to create a more organized chain of command, the respondent applied to the Inspector General of Police to designate the ranks for their security assistants. By letter dated 13 February 1981, the Inspector General of Police, through its commanding officer for the junior posts, approved 43 security assistants time scale grade C–11 to be designated E as auxiliary police sergeants, two security assistants senior scale grade C–3 to be designated as auxiliary police sergeant majors and one security assistant super scale grade C–1 to be designated as auxiliary police sub-inspector. Hence, the open letter from the respondent to all the security assistants to apply for the 46 posts.

F It is not, therefore, within the jurisdiction of the respondent to decide on the conferment of the auxiliary police rank on their security assistants. The scheme of service which they had adopted for their security force is a civilian scheme and has nothing to do with the problem in question. The decision on the number and the category entitled to be conferred with a particular auxiliary police rank is the decision of the Inspector General of G Police or the commanding officer under the Police Act 1967.

The result of this is that security assistants in the respondent have ended up holding different auxiliary police ranks, namely that of constable, sergeant, sergeant major and sub-inspector although they are in the same salary scale and possess the same qualifications. Thus, a security assistant H employed by the respondent cannot simply expect to be automatically conferred by the respondent with an auxiliary police rank higher or other than the one actually conferred upon him. The auxiliary police rank is a privilege and not a right and is in the sole discretion of the Inspector General of Police or the commanding officer, not the respondent. In our I view, the respondent had acted fairly, properly and lawfully in inviting all the security assistants to apply for the higher auxiliary police rank and those who did not apply, namely the appellants, surely cannot expect to be conferred what they did not apply for.

As for the special allowance of RM40 a month granted to the security assistants conferred the power of auxiliary police sergeant which had been backdated to 11 May 1982, the date they were conferred the higher auxiliary police rank, this was the special allowance for that higher rank prescribed by the Minister under s 49A of the Police Act 1967. As for the higher housing allowance of RM138 per month compared to the appellants' RM85 a month which had been backdated to 1 September 1991, this is in line with Service Circular No 10 of 1980.

Having considered the affidavits, arguments and authorities, we are of the unanimous view that the appellants are not time-barred because the act, neglect or default complained of is still continuing, that it is quite proper in the present circumstances to consider a point of law where the parties had proceeded in the court below upon an erroneous admission of the law which did not bind us, and that on the facts of this case, there is no discrimination by the respondent against the appellants. It is not in the respondent's power to confer the auxiliary police ranks or the special allowances or housing allowances in respect thereof. Things would certainly be different if they had not invited the appellants to apply for the higher auxiliary police rank which would have been a clear case of discrimination. In the event, we would dismiss the appeal with costs and order the deposit to be paid to the respondent to account for their taxed costs.

Appeal dismissed.

Reported by Azra Azman-Parry